NO. 48810-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES E. MITCHELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable G. Helen Whitener and Kathryn Stolz

No. 14-1-02979-1

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. Procedure

On July 29, 2014, the Pierce County Prosecuting Attorney (State) charged James Mitchell, the defendant, with murder in the first degree in the death of Linda Robinson. CP 3. The State filed an amended Information July 16, 2015, deleting the previous deadly weapon allegation. CP 152.

The defendant filed a number of pre-trial motions. The most significant was a motion to exclude the results of the DNA testing. CP 144-149. The pre-trial motion was assigned to Hon. G. Helen Whitener. 9/24/2015 RP ff. Judge Whitener conducted an extensive hearing regarding the motion to exclude the evidence. 9/24/2015 RP. After considering the testimony and other evidence, Judge Whitener ruled that the blood samples and the resulting DNA testing were admissible. 9/30/2015 RP 369, CP 189-194.

The case proceeded to trial. The trial was assigned to Hon. Kathryn Stolz. 11/2/2015 RP 3. After hearing all the evidence, the jury found the defendant guilty, as charged. CP 244. On March 25, 2016, the court sentenced the defendant to 450 months in prison. CP 302. The defendant filed a timely notice of appeal. CP 311.

2. Facts

On February 6, 1993, Shawonika Elliott was a seven year old girl spending the night with her cousins at her aunt's apartment. 1/26/2016 RP 314. Elliot's aunt, Linda Robinson, often provided childcare for her sisters' children. 1/25/2015 RP 250. The cousins were sleeping in the living room of the small one-bedroom apartment. 1/26/2016 RP 315.

Elliott was awakened by the smoke-alarm going off. 1/26/2016 RP 316. She remembered that Robinson had started to make Top-Ramen. 1/26/2016 RP 319. Elliott smelled something burning in the kitchen and

wondered why her aunt was burning the Top-Ramen. 1/26/2016 RP 320. Elliott went to the kitchen to find out what was going on. *Id.*

Elliott found Robinson laying on the kitchen floor in a pool of blood. 1/26/2016 RP 321. Elliott turned off the stove. 1/26/2016 RP 320. She then went across the landing to ask the neighbor to call 911. 1/26/2016 RP 322.

Police and medical aid arrived and discovered that Robinson was dead. 1/27 2016 RP 445. Detectives arrived to investigate. They observed that Robinson had been stabbed multiple times in the back. 1/27/2016 RP 461. They found the phone nearby. It had been removed from the wall; the cord disconnected or cut. 1/27/2016 RP 462, 2/8/2016 RP 810. Detectives noted blood smears on the refrigerator. 2/8/2016 RP 807. There was blood spatter in the hall and on the front of the nightstand in the bedroom. 2/8/2016 RP 814, 816. Blood samples were collected from the bathroom floor, the hallway, the bedroom, the bedroom vanity and dresser, a child's coat, and the kitchen wall. 2/3/2016 RP 525.

An autopsy confirmed that Robinson had been stabbed several times in the back; actually 10 times. 2/9/2016 RP 974. Robinson had numerous defensive cutting or stab wounds on her hands and arms. 2/9/2016 RP 969, 970, 973. She had numerous superficial cut or stab wounds on her chest and torso. 2/9/2016 RP 968, 969. Two of the stab wounds to her back were very deep. One penetrated the chest cavity and lung. 2/9/2016 RP 977. Another punctured her liver. *Id.* The cause of

death was from blood loss or a punctured lung, caused by the knife wounds. 2/9/2016 RP 978.

In 2013, Det. Kobel of the Pierce County Sheriff's Dept. began to reexamine the case. 1/25/2016 RP 182. He reviewed the photographs and evidence that had been collected. 1/25/2016 RP 184-185. He sent the blood sample swabs to the crime laboratory for DNA analysis. 1/25/2016 RP 208. At least five of the samples, including those taken from the locations in the kitchen and the bedroom were positive as the DNA of the defendant. 2/10/2016 RP 65.

Police located the defendant, who was living in Florida. 2/10/2016 RP 103. The defendant was arrested and returned to Washington. 2/10/2016 RP 104.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING BLOOD EVIDENCE.

a. The law regarding chain of custody.

Trial court decisions on the admission of evidence are within the court's discretion and are reviewed for abuse of discretion. ***State v. Perez–Valdez***, 172 Wn.2d 808, 814, 265 P.3d 853 (2011); ***State v. Campbell***, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. ***State v. Bradford***, 175 Wn. App. 912, 927, 308 P.3d 736 (2013).

Where evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. ***Campbell***, 103 Wn.2d at 21. The proponent need not establish a chain of custody with absolute certainty, but "with sufficient completeness to render it *improbable* that the original item has either been exchanged with another or been contaminated or tampered with." ***State v. Roche***, 114 Wn. App. 424, 436, 59 P. 3d 682 (2002)(emphasis in the original). Factors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. ***Campbell***, 103 Wn.2d at 21. The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. *Id.* at 21. "[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility." *Id.*

b. <u>The defendant does not assign error to the trial court's Findings of Fact</u>.

When reviewing an order on a motion to admit or exclude evidence, the appellate court determines whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *See* ***State v. Garvin***, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. *Id.* Unchallenged

findings of fact are verities on appeal. ***State v. Valdez***, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). The trial court's conclusions of law pertaining to the admission of evidence are reviewed de novo. ***Garvin***, at 249.

The trial court entered Findings and Conclusions in this case. CP 189-194. While the defendant generally challenges the court's conclusions that the evidence was admissible, he does not assign error to any of the court's Findings of Fact. App. Br. at 1.The unchallenged findings are therefore verities on appeal. Significantly, among other Findings, the trial court found:

> II. 6.The Forensics Lab is a secure holding area. It is locked to the general public. Inside, it has individual lockers where forensics officers can store evidence for a given [sic] lock the locker, and take the key. It also has areas for drying evidence and processing evidence.
>
> ...
>
> II. 8. The items collected by Officer Johnson were in the Forensics Lab from February 7, 1993, to April 13, 1993, a total of 65 days.

CP 191.

c. <u>The trial court's findings are supported by substantial evidence</u>.

Here, the admissibility of the blood evidence, and thus the defendant's DNA found at the scene of the murder, was an important part of the State's case. There was an extensive pretrial hearing on the issue, lasting over two days. The court heard exhaustive testimony from six

witnesses, including the two forensic officers who originally collected and booked the evidence in 1993. 9/24/2015 RP 24-87, 104-124. The court and parties took a tour of the forensics laboratory, including the storage areas, to see for itself how evidence was handled and stored by the Pierce County Sheriff's forensic unit. 9/28/2015 RP 179-183. The court took almost an entire day to review the evidence and consider the law before rendering its decision.

At trial and on appeal, the defendant makes much of the fact that the evidence at issue was not transferred to the property room for 66 days. App. Br. at 12, 14. The defendant implies that this evidence was somehow unaccounted-for or missing. This is mere speculation. Testimony and records show that the blood evidence was in the forensics lab storage area the entire time. 9/24/2015 RP 34-39, 108-109. The defendant ignores the testimony regarding the records and security of the forensics lab. 9/24/2015 RP 58-63, 109,112, 9/28/2015 RP 151-155. The court itself toured the lab to examine the security measures.

It is difficult to conceive of a more thorough examination of the chain of custody of these items of evidence in this case. The court's findings were supported by substantial evidence. The hearing alone takes up over 300 pages of the VRP. The court was extremely careful and deliberative in considering the law and the evidence. The trial court should

be commended in the care it took in exercising its discretion. There was certainly no error.[1]

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMENTS OF PREMEDITATED MURDER.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. ***State v. Brockob***, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *see also* ***State v. Kintz***, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Direct and circumstantial evidence are equally reliable. ***State v. Thomas***, 150 Wn. 2d 821, 874, 83 P. 3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. ***Thomas***, at 874-875; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The presence of contrary or countervailing evidence is irrelevant to a sufficiency-of-the-evidence challenge because the evidence is viewed in the light most

[1] At trial, the defendant admitted that he had been in Robinson's apartment on the night that she was killed. He explained that his blood must have dripped from a cut he suffered in a fight with an unidentified man at Robinson's apartment that night. 2/19/2016 RP 996-998.

favorable to the State. ***State v. Ibarra–Cisneros***, 172 Wn.2d 880, 896, 263 P.3d 591 (2011).

Premeditation involves a deliberate formation of and reflection upon the intent to take a human life and includes the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning for a period of time, however short. ***State v. Hoffman***, 116 Wn.2d 51, 82–83, 804 P.2d 577 (1991). Premeditation must involve "more than a moment in point of time." RCW 9A.32.020(1). Factors relevant to establish premeditation include motive, procurement of a weapon, stealth, and method of killing. *See* ***State v. Pirtle***, 127 Wn.2d 628, 644, 904 P.2d 245 (1995).

Both direct and circumstantial evidence can be used to establish premeditation. *See* ***State v. Bingham***, 105 Wn.2d 820, 823, 719 P.2d 109 (1986). Absent a confession by the defendant to his intent, proof of a mental state, including premeditation, is through circumstantial evidence.

Several cases are illustrative regarding the circumstantial evidence that is sufficient for the jury to find premeditation. In ***State v. Gentry***, 125 Wn.2d 570, 599, 888 P.2d 1105 (1997), Gentry attempted to sexually assault the victim, a young girl, and killed her with 8 to 15 blows, 10 of which were "significant", from a rock he had picked up at the scene. The results of the autopsy could not show the order in which the blows were received or which blow actually killed the victim. There was evidence of a prolonged struggle between the victim and the defendant. *Id.*, at 600. DNA

and other blood analysis was used to identify Gentry. *Id.*, at 580-581. The Supreme Court noted that sufficient evidence to infer premeditation could be found where multiple wounds were inflicted; a weapon was used; the victim was struck from behind; and there was evidence of a motive, such as robbery or sexual assault. Also, where multiple wounds were inflicted by a knife procured at the site of the killing. *Id.*, at 599.

In ***State v. Clark***, 143 Wn. 2d 731, 769-770, 24 P. 3d 1006 (2001), the victim was killed with a knife and was stabbed at least seven times in the neck. Cuts on her hands indicated a defensive struggle, and she was sexually assaulted. This evidence was found to be sufficient to prove premeditation. *Id.*, at 770.

In ***State v. Ortiz***, 119 Wn.2d 294, 831 P.2d 1060 (1992), the murder occurred in a bedroom, and not the kitchen where the knife was found. *Id.* at 313. Additionally, the victim had multiple wounds, was struck in the face with something other than the knife, and the defensive wounds found on the victim provided evidence of a prolonged struggle. *Id.* at 312–313. Although the knife was procured on the premises, the jury could have found that the act of obtaining the knife involved deliberation.

Likewise, in ***State v. Ollens***, 107 Wn.2d 848, 850, 733 P.2d 984 (1987), the victim was stabbed numerous times and, thereafter, the victim's throat was slashed. Significantly, a knife was used, which required procurement of a weapon. Also, the victim was struck from behind. Finally, there was evidence of a motive of robbery. *Id.*, at 853.

Here, much like the above cases, the victim was stabbed multiple times, over 10 times in her chest, back and torso alone. The defendant used a knife which he either brought with him or obtained at the scene. The victim was not killed immediately, but after some period of time. Her numerous defensive wounds and the blood spatter and smears in the kitchen and bedroom was evidence of a prolonged struggle which moved from room to room. During the struggle, the defendant had an opportunity to meditate, think, and withdraw from this course of action. There was evidence of theft or attempted theft; that the defendant had gone through the victim's pockets and her dresser and vanity drawers. In addition, three young children were asleep in the living room of this small apartment. They were not awakened by the prolonged struggle.

From this evidence, the jury could conclude that the defendant, at some point in his contact with the victim, formulated a plan to kill her. He decided to arm himself with a knife. He kept his homicidal assault on the victim quiet enough to avoid detection by the children present only a few feet away. The stab wounds in the back either showed that the victim was held as she was stabbed or that she was stabbed after she had been knocked to the floor; finishing her off. From this evidence, the jury could conclude that the defendant somehow prevented the victim from crying out in pain or for help. The jury could conclude that theft was a partial motive.

The evidence of premeditation in this case was as good as, or better than, that in ***Gentry***, ***Clark***, ***Ortiz***, or ***Ollens***. Understandably, the defendant has a different view of what the jury could conclude from the evidence. But the defendant does not get to re-argue the weight and conclusions from the evidence on appeal. By challenging the sufficiency of the evidence, the defendant admits all of the evidence is true and all reasonable inferences and conclusions from it. The evidence of premeditation was sufficient for the jury to find the element beyond a reasonable doubt.

3. THE TRIAL COURT PROPERLY CONCLUDED THAT THE DEFENDANT'S FLORIDA ROBBERY CONVICTION WAS COMPARABLE TO A WASHINGTON ROBBERY CONVICTION.

A defendant's offender score is calculated according to RCW 9.94A.525. Where a defendant has out-of-state criminal history, the court must classify them according to comparable Washington law. RCW 9.94A.525(3); ***In re Personal Restraint of Lavery***, 154 Wn. 2d 249, 111 P.3d 837 (2005). For the comparability analysis, the court first looks at the elements of the respective crimes. *Id.*, at 255, citing ***State v. Morley***, 134 Wn. 2d 588, 605-606, 952 P.2d 167 (1998).

Under this test, a foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. ***Lavery***, at 255-258. A foreign offense is legally comparable "if the elements of the foreign offense are substantially similar to the elements of the Washington

offense." ***State v. Thiefault***, 160 Wn.2d at 409, 415, 158P.3d 580 (2007), *see also* ***Lavery***, at 255. If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court must then determine whether the offense is factually comparable. ***Morley***, 134 Wn.2d at 606.

If the elements of the foreign offense are comparable to those of a Washington offense, then "the inquiry ends" and the foreign crime counts toward the offender score as if it were the comparable Washington crime. ***State v. Sublett***, 176 Wn.2d 58, 87, 292 P.3d 715 (2012) (lead opinion); *see also* ***State v. Jordan***, 180 Wn. 2d 456, 461, 325 P. 3d 181 (2014).

Here, the defendant had a prior 1983 conviction for armed robbery in Florida. Sentencing Exh. 1. In Florida in 1983, robbery was:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.
>
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment[.]
>
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree[.]

Former Fla. St. 812.13.

In Washington:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

Further:

> (1) A person is guilty of robbery in the first degree if:
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
> (i) Is armed with a deadly weapon; or
> (ii) Displays what appears to be a firearm or other deadly weapon; or
> (iii) Inflicts bodily injury[.]

RCW 9A.56.200.

The elements of these statutes are comparable. The elements need to be "substantially similar". ***Thiefault***, 160 Wn. 2d at 415.The SRA does not require exactitude, only "comparability." ***Jordan***, 180 Wn.2d at 466. A comparison of these statutes shows that Florida and Washington define robbery in essentially the same way; that Florida and Washington both classify robbery committed with a deadly weapon as robbery in the first

degree. Contrary to the defendant's argument, the Florida statute is not broader than Washington's. While Washington adds language "to obtain or retain" property, this is essentially the same as the Florida allegation "intent to permanently deprive" found in the charging document. Sentencing Exh. 1.

Factually, the Florida allegation would be a robbery in the first degree in Washington. The defendant:

> ...by force, violence, assault or putting in fear, take away from the person or custody of [victim] certain property, to-wit: a room key, and a wallet containing UNITED STATES MONEY CURRENT [sic], the property of [victim] as owner or custodian thereof, with the intent to permanently deprive the said owner or custodian of the property, and in the course of committing the robbery, the said [defendant and accomplices] did carry a firearm or other deadly weapon, to-wit: knives.

Sentencing Exh. 1. The sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute. ***Morley***, 134 Wn. 2d at 606.

The defendant's Florida robbery conviction was both legally and factually comparable to a Washington robbery in the first degree. The trial court did not err.

4. APPELLATE COSTS.

In light of recent changes to RAP 14.2 and the fact that the defendant, who is 54 years old and was sentenced to over 37 years in prison, it is extremely unlikely that the State will seek appellate costs if it prevails in this appeal. If the State becomes aware of any evidence that the defendant has subsequently acquired significant financial resources, the State will present that information to the Commissioner.

D. CONCLUSION.

The trial court took great care in deciding whether to admit the blood evidence and resulting DNA test results. The element of premeditation was proven through circumstantial evidence. The trial court correctly determined that the defendant's prior armed robbery conviction in Florida was comparable to armed robbery in Washington.

The State respectfully requests that the conviction and judgement be affirmed.

DATED: March 22, 2017.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-23-17 Heven Kar

Date Signature

PIERCE COUNTY PROSECUTOR
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